

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 ELTON ANDERSON,) NO. CV 07-00708 SS
12)
13 Plaintiff,)
14)
15 v.)
16)
17 MICHAEL J. ASTRUE,)
18 Commissioner of the Social)
19 Security Administration,)
20)
21 Defendant.)
22)
23)
24)
25)
26)
27)
28)

18 INTRODUCTION

19
20 Elton Anderson ("Plaintiff") brings this action seeking to overturn
21 the decision of the Commissioner of the Social Security Administration
22 (hereinafter the "Commissioner" or the "Agency") denying his application
23 for Supplemental Security Income ("SSI") benefits. Alternatively, he
24 asks for a remand. The parties consented, pursuant to 28 U.S.C. §
25 636(c), to the jurisdiction of the undersigned United States Magistrate
26 Judge. For the reasons stated below, the decision of the Commissioner
27 is REVERSED and REMANDED for further proceedings.
28

1 **THE FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

2

3 To qualify for disability benefits, a claimant must demonstrate

4 a medically determinable physical or mental impairment that prevents him

5 from engaging in substantial gainful activity¹ and that is expected to

6 result in death or to last for a continuous period of at least twelve

7 months. Reddick v. Chater, 157 F.3d 715, 721 (9th Cir. 1998) (citing

8 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant

9 incapable of performing the work he previously performed and incapable

10 of performing any other substantial gainful employment that exists in

11 the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir.

12 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

13

14 To decide if a claimant is entitled to benefits, an ALJ conducts

15 a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps are:

16

17 (1) Is the claimant presently engaged in substantial gainful

18 activity? If so, the claimant is found not disabled.

19 If not, proceed to step two.

20 (2) Is the claimant's impairment severe? If not, the

21 claimant is found not disabled. If so, proceed to step

22 three.

23 (3) Does the claimant's impairment meet or equal one of list

24 of specific impairments described in 20 C.F.R. Part 404,

25

26

27 ¹ Substantial gainful activity means work that involves doing

28 significant and productive physical or mental duties and is done for pay

or profit. 20 C.F.R. §§ 404.1510, 416.910.

1 Subpart P, Appendix 1? If so, the claimant is found
2 disabled. If not, proceed to step four.

3 (4) Is the claimant capable of performing his past work? If
4 so, the claimant is found not disabled. If not, proceed
5 to step five.

6 (5) Is the claimant able to do any other work? If not, the
7 claimant is found disabled. If so, the claimant is
8 found not disabled.

9
10 Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d
11 949, 953-54 (9th Cir. 2001) (citations omitted); 20 C.F.R. §§
12 404.1520(b)-(g)(1) & 416.920(b)-(g)(1).

13
14 The claimant has the burden of proof at steps one through four, and
15 the Commissioner has the burden of proof at step five. Bustamante, 262
16 F.3d at 953-54. If, at step four, the claimant meets his burden of
17 establishing an inability to perform past work, the Commissioner must
18 show that the claimant can perform some other work that exists in
19 "significant numbers" in the national economy, taking into account the
20 claimant's residual functional capacity ("RFC"),² age, education, and
21 work experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at
22 721; 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1). The Commissioner may
23 do so by the testimony of a vocational expert or by reference to the
24 Medical-Vocational Guidelines appearing in 20 C.F.R. Part 404, Subpart
25 P, Appendix 2 (commonly known as "the Grids"). Osenbrock v. Apfel, 240
26

27 ² Residual functional capacity is "what [one] can still do
28 despite [his] limitations" and represents an "assessment based upon all
of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

1 F.3d 1157, 1162 (9th Cir. 2001). When a claimant has both exertional
2 (strength-related) and nonexertional limitations, the Grids are
3 inapplicable and the ALJ must take the testimony of a vocational expert.
4 Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

5 6 STANDARD OF REVIEW

7
8 Under 42 U.S.C. § 405(g), a district court may review the
9 Commissioner's decision to deny benefits. The court may set aside the
10 Commissioner's decision when the ALJ's findings are based on legal error
11 or are not supported by substantial evidence in the record as a whole.
12 Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Smolen v.
13 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

14
15 "Substantial evidence is more than a scintilla, but less than a
16 preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence
17 which a reasonable person might accept as adequate to support a
18 conclusion." Id. To determine whether substantial evidence supports
19 a finding, the court must "'consider the record as a whole, weighing
20 both evidence that supports and evidence that detracts from the
21 [Commissioner's] conclusion.'" Aukland, 257 F.3d at 1035 (quoting Penny
22 v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can
23 reasonably support either affirming or reversing that conclusion, the
24 court may not substitute its judgment for that of the Commissioner.
25 Reddick, 157 F.3d at 720-21.

DISCUSSION

A. The ALJ Failed To Properly Assess Plaintiff's Mental Health Impairment At Step Two of the Evaluation Process

Plaintiff contends that the ALJ erred by finding that Plaintiff does not suffer from a severe mental impairment. (Jt. Stip. at 4). For the reasons discussed below, the Court finds that the ALJ failed to properly assess Plaintiff's mental health impairment.

By its own terms, the evaluation at step two is a de minimis test – intended to weed out the most minor of impairments. See Bowen v. Yuckert, 482 U.S. 137, 153-154, 107 S. Ct. 2287, 2299-2300, 96 L. Ed. 2d 119 (1987)(O'Connor, J. concurring); Edlund v. Massanari, 253 F.3d 1152, 1158 (9th Cir. 2001)(the step-two inquiry is a de minimis screening device to dispose of groundless claims)(quoting Smolen v Chater, 80 F.3d 1273, 1290 (9th Cir. 1996)).

The ALJ here applied more than a de minimis test at step two when he determined that Plaintiff's mental impairment was not severe. He improperly discounted evidence in the record that would establish a severe impairment. Finally, he failed to follow the Secretary's own regulations governing the evaluation of mental impairments, as described below.

Where there is evidence of a mental impairment that allegedly prevents the plaintiff from working, the Agency has supplemented the five-step sequential evaluation process with additional regulations.

1 Maier v. Comm'r of the Soc. Sec. Admin., 154 F.3d 913, 914-15 (9th Cir.
2 1998) (citing 20 C.F.R. § 416.920a) (per curiam). First, the ALJ must
3 determine the presence or absence of certain medical findings relevant
4 to the plaintiff's ability to work. 20 C.F.R. § 416.920a(b)(1).
5 Second, when the plaintiff establishes these medical findings, the ALJ
6 must rate the degree of functional loss resulting from the impairment
7 by considering four areas of function: (a) activities of daily living;
8 (b) social functioning; (c) concentration, persistence, or pace; and (d)
9 episodes of decompensation. 20 C.F.R. § 416.920a(c)(2-4). Third, after
10 rating the degree of loss, the ALJ must determine whether the claimant
11 has a severe mental impairment. 20 C.F.R. § 416.920a(d). Fourth, when
12 a mental impairment is found to be severe, the ALJ must determine if it
13 meets or equals a listing in 20 C.F.R. Part 404, Subpart P, Appendix 1.
14 20 C.F.R. § 416.920a(d)(2). Finally, if a listing is not met, the ALJ
15 must then assess the plaintiff's RFC, and the ALJ's decision "must
16 incorporate the pertinent findings and conclusions" regarding he
17 plaintiff's mental impairment, including "a specific finding as to the
18 degree of limitation in each of the functional areas described in [§
19 416.920a(c)(3)]." 20 C.F.R. § 416.920a(d)(3), (e)(2).

20
21 The regulations describe an impairment as follows:
22

23 A physical or mental impairment must result from anatomical,
24 physiological, or psychological abnormalities which can be
25 shown by medically acceptable clinical and laboratory
26 diagnostic techniques[]. A physical or mental impairment
27 must be established by medical evidence consisting of signs,
28

1 symptoms, and laboratory findings, not only by [a
2 plaintiff's] statements of symptoms.

3
4 20 C.F.R. § 416.908; see also Ukolov v. Barnhart, 420 F.3d 1002, 1005
5 (9th Cir. 2005) (noting that the existence of a medically determinable
6 physical or mental impairment may only be established with objective
7 medical findings) (citing SSR 96-4p, 1996 WL 374187, at *1-2).

8
9 In the instant case, Plaintiff filed his application for benefits
10 on April 7, 2004. On October 5, 2004 and on February 2, 2005, he was
11 examined at the Mental Health Urgent Care Center at Long Beach. The
12 report notes that Plaintiff was currently taking Prozac and Seroquel (AR
13 240), both medications associated with the treatment of mental health
14 conditions. (AR 227). The clinical assessment concluded that Plaintiff
15 suffers from a "schizoaffective disorder" and assessed Plaintiff with
16 a GAF of 35.³ (AR 234, 236). In another document, labeled "MHUCC
17 Psychiatrist Intake Assessment," the doctor described Plaintiff as
18
19

20
21 ³ A Global Assessment of Functioning score is the clinician's
22 judgment of the individual's overall level of functioning. It is rated
23 with respect only to psychological, social, and occupational
24 functioning, without regard to impairments in functioning due to
25 physical or environmental limitations. See American Psychiatric
26 Association, Diagnostic and Statistical Manual of Mental Disorders, 32
27 (4th ed. 2000) (hereafter, "DSM IV"). A rating of 31-40 on the GAF
28 scale indicates "[s]ome impairment in reality testing or communication
(e.g., speech is at times illogical, obscure, or irrelevant) OR major
impairment in several areas, such as work or school, family relations,
judgment, thinking, or mood (e.g., depressed man avoids friends,
neglects family, and is unable to work; child frequently beats up
younger children, is defiant at home, and is failing at school)." See
DSM IV, at 34.

1 depressed for ten years. (AR 242). He reported chronic suicidal intent
2 and that Plaintiff had attempted to kill himself. (AR 243).

3
4 In the evaluator's notes, he commented that Plaintiff was referred
5 for an evaluation of depression. (AR 236). Further, he found that
6 Plaintiff was unable to deny or state that he has present suicidal
7 intent, but noted that Plaintiff then stated he has had suicidal intent
8 for years. (Id.). These assessments show the existence of a severe
9 mental impairment.

10
11 The ALJ did not properly credit the opinions of these treating
12 physicians at his step two analysis:

13
14 On October 5, 2004 and again on February 2, 2005, the
15 claimant was seen at Telecare Mental Urgent Care (citation
16 omitted). There were conclusions in those reports indicated
17 that the claimant has a severe mental impairment. However,
18 there is no clearly stated basis for such conclusions and the
19 report is insufficiently detailed to credit. The claimant
20 has no history of psychiatric treatment or other evidence to
21 confirm a severe psychiatric impairment. The regulations do
22 not permit me to make a finding of disability on the basis of
23 the claimant's allegations of symptoms alone; there must be
24 medical signs and laboratory findings that show the claimant
25 has a medial impairment which could reasonably be expected to
26 produce the symptoms alleged. (citation omitted0. In this
27 case there are only the claimant's assertions. I cannot find
28 a severe mental impairment on this basis.

1 The ALJ impermissibly combined the "disability" finding with the "step
2 two" finding. The "step two" assessment involves a much lower standard
3 than the actual disability finding.

4
5 Given the conclusions reached when Plaintiff was examined on
6 October 5, 2004 and on February 2, 2005 and given that a prior doctor
7 concluded that Plaintiff needed both Prozac and Seroquel, sufficient
8 evidence existed in the record to conclude that Plaintiff met the de
9 minimis test posed by step two, i.e., that he suffered from a severe
10 mental impairment. See 20 C.F.R. § 416.920a(b)(1).

11
12 The Court further agrees with Plaintiff that, if the ALJ felt that
13 the record was inadequate or "insufficiently detailed," he had a duty
14 to develop the record, either by seeking more information from
15 Plaintiff's treating doctors or by requiring Plaintiff to undergo a
16 consultative psychiatric examination.

17
18 **B. The ALJ Failed To Provide Clear And Convincing**
19 **Reasons For Rejecting Plaintiff's Subjective Pain**
20 **Testimony**
21

22 Whenever an ALJ's disbelief of a claimant's testimony is a critical
23 factor in a decision to deny benefits, as it is here, the ALJ must make
24 explicit credibility findings. Rashad v. Sullivan, 903 F.2d 1229, 1231
25 (9th Cir. 1990); see Albalos v. Sullivan, 907 F.2d 871, 874 (9th Cir.
26 1990) (implicit finding that claimant was not credible is insufficient).
27 Unless there is affirmative evidence showing that the claimant is
28 malingering, the ALJ's reasons for rejecting the claimant's testimony

1 must be "clear and convincing." Lester, 81 F.3d at 834. As long as
2 plaintiff offers evidence of a medical impairment that could reasonably
3 be expected to produce pain, the ALJ may not require the degree of pain
4 to be corroborated by objective medical evidence. Bunnell v. Sullivan,
5 947 F.2d 341, 346-47 (9th Cir. 1991) (en banc); Smolen v. Chater, 80
6 F.3d 1273, 1282 (9th Cir. 1996). The ALJ may not discredit a claimant's
7 testimony of pain and deny disability benefits solely because the degree
8 of pain alleged by the claimant is not supported by objective medical
9 evidence. Bunnell, 947 F.2d at 346-47.

10
11 The sole reason that the ALJ rejected Plaintiff's testimony is that
12 he did not have "thorough diagnostic examinations" and was treated
13 "conservatively." The record contradicts this finding. (See AR 113-114
14 (describing diagnostic examinations in connection with back pain); AR
15 115 (x-rays); AR 122 (x-rays); AR 163 (Radiology report)). The record
16 further reflects that Plaintiff repeatedly sought a variety of treatment
17 for his back pain, over several years, and was heavily medicated for his
18 back pain, with the side effect of sleepiness.⁴

19
20 There may be alternative reasons why the ALJ could reject
21 Plaintiff's testimony. However, the reasons given were not clear and
22 convincing. Remand is required to remedy this defect.
23

24

25 ⁴ The Court notes that, upon remand, further consideration of
26 Plaintiff's mental condition, back pain or other impairments may result
27 in a modification of the RFC. Given the evidence of these conditions in
28 the record, the Court finds the ALJ's conclusion that Plaintiff can
return to his past relevant work as a hospital central service
technician is questionable. There may, however, be other jobs that
Plaintiff is capable of performing. This issue may be further
considered by the ALJ upon remand as well.

C. Remand is Required To Remedy Defects In The ALJ Decision

Remand for further proceedings is appropriate where additional proceedings could remedy defects in the Commissioner's decision. See Harman v. Apfel, 211 F.3d 1172, 1179 (9th Cir.), cert. denied, 531 U.S. 1038, 121 S. Ct. 628, 148 L. Ed. 2d 537 (2000); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984). Because the ALJ improperly evaluated Plaintiff's mental health impairment at step two, the case must be remanded to remedy this and other defects.

Upon remand, the ALJ must conduct the supplemental evaluation of mental impairment evidence. Normally, the ALJ must first determine the presence or absence of certain medical findings relevant to the plaintiff's ability to work. 20 C.F.R. § 416.920a(b)(1). However, this Court has determined that there is objective medical evidence that Plaintiff suffers from a mental impairment relevant to his ability to work. Thus, the ALJ need not address this question. Accordingly, the ALJ must only complete the remaining inquiries required in the supplemental evaluation of mental impairment evidence.⁵

⁵ Specifically, the ALJ must rate the degree of functional loss resulting from the impairment by considering four areas of function: (a) activities of daily living; (b) social functioning; (c) concentration, persistence, or pace; and (d) episodes of decompensation. 20 C.F.R. § 416.920a(c)(2-4). Next, after rating the degree of loss, the ALJ must determine whether the claimant has a severe mental impairment. 20 C.F.R. § 416.920a(d). If the mental impairment is found to be severe, the ALJ must determine if it meets or equals a listing in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. § 416.920a(d)(2). Finally, if a listing is not met, the ALJ must then assess the plaintiff's RFC, and the ALJ's decision "must incorporate the pertinent findings and conclusions" regarding the plaintiff's mental impairment, including "a specific finding as to the degree of limitation in each of the functional areas described in [§ 416.920a(c)(3)]." 20 C.F.R. §

1 Plaintiff's credibility must be reconsidered in the ALJ's
2 assessment of Plaintiff's RFC. On remand, the parties shall not be
3 precluded from addressing any issue not resolved by this Court.
4

5 **CONCLUSION**
6

7 Consistent with the foregoing, and pursuant to sentence four of 42
8 U.S.C. § 405(g),⁶ IT IS ORDERED that judgment be entered REVERSING the
9 decision of the Commissioner and REMANDING this matter for further
10 proceedings consistent with this decision. IT IS FURTHER ORDERED that
11 the Clerk of the Court serve copies of this Order and the Judgment on
12 counsel for both parties.
13

14 DATED: January 14, 2008.

15 /S/
16

17 SUZANNE H. SEGAL
18 UNITED STATES MAGISTRATE JUDGE
19
20
21
22
23
24

25 _____
26 416.920a(d)(3), (e)(2).

27 ⁶ This sentence provides: "The [district] court shall have power
28 to enter, upon the pleadings and transcript of the record, a judgment
affirming, modifying, or reversing the decision of the Commissioner of
Social Security, with or without remanding the cause for a rehearing."